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May 24, 2007

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GENERAL COUNSEL

**VIA EFILING AND HAND DELIVERY**

Mr. Charles L.A. Terreni  
Chief Clerk/Administrator  
South Carolina Public Service Commission  
101 Executive Center Dr., Suite 100  
Columbia, SC 29210

Re: Application of New Horizons Communications Corporation for Authority to Operate  
as a Reseller of Interexchange Telecommunications Services within the State of  
South Carolina and for Alternative Regulation  
**Docket No. 2007-20-C**

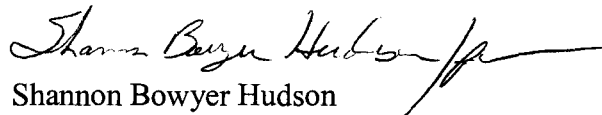
Dear Mr. Terreni:

Enclosed for filing you will find the original and one (1) copy of the Exception and Brief To Proposed Order of the Hearing Examiner in the above referenced matter.

Please note that the attached documents are exact duplicates, with the exception of the form of the signature, of the e-filed copy submitted to the Commission in accordance with its electronic filing instructions.

Please date stamp the extra copy enclosed and return it to me in the envelope provided and do not hesitate to let me know if you have any questions.

Sincerely,

  
Shannon Bowyer Hudson

SBH/pjm  
Enclosures

cc: Scott Elliott, Esquire  
Lance J.M. Steinhart, Esquire

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2007-20-C**  
**May 24, 2007**

<b>In Re:</b>	)	
	)	
<b>Application of New Horizons</b>	)	<b>Exception and Brief to Proposed</b>
<b>Communications For Authority to Operate as</b>	)	<b>Order of the Hearing Examiner</b>
<b>Reseller of Interexchange Telecommunications)</b>	)	<b>Rejecting the Settlement</b>
<b>Services within South Carolina</b>	)	<b>Agreement and Application</b>
_____	)	

The South Carolina Office of Regulatory Staff (“ORS”) respectfully submits this Exception and Brief to the Proposed Order of the Hearing Examiner Rejecting the Settlement Agreement and Application pursuant to 26 S.C. Code Regs. 103-841(C) (S.C. Reg. Vol. 31, Issue 4, April 27, 2007). ORS requests that the Public Service Commission of South Carolina (“Commission”) consider the points raised herein related to the Proposed Order issued in the above matter on May 3, 2007. ORS further requests that the Commission amend the Proposed Order consistent with the issues raised below. In support of this Exception and Brief, ORS will show the following:

1. ORS is a formal party of record in this docket.
2. On April 26, 2007, the parties of record in this docket, New Horizons Communications (“New Horizons”) and ORS, together as (“the Parties”) submitted a Settlement Agreement (“Settlement Agreement”) wherein the Parties agreed that New Horizons should be granted a Certificate of Public Convenience and Necessity (“PC&N”)

to operate as a reseller of interexchange telecommunications services within the state of South Carolina as requested in its Application.

3. On April 30, 2007, the matter was heard before a Hearing Examiner wherein New Horizons's witness, Mr. Glen Nelson, Vice President of Marketing and Business Development, testified before the Hearing Examiner. New Horizons was represented by Scott Elliott, Esquire and ORS was represented by Shannon Bowyer Hudson, Esquire.

4. On May 3, 2007, the Hearing Examiner issued a Proposed Order rejecting the Settlement Agreement and Application on the basis that New Horizons lacks the financial capability to provide the interexchange services that it proposes to offer.

5. On May 4, 2007, ORS received the Hearing Examiner's Proposed Order.

6. On May 14, 2007, New Horizons requested a ten day extension on behalf of New Horizons and ORS to file an Exception and Brief to the Proposed Order.

7. On May 16, 2007, the Commission granted the request for a ten day extension.

8. In accordance with 26 S.C. Code Regs. 103-841(C) (S.C. Reg. Vol. 31, Issue 4, April 27, 2007), ORS respectfully files this Exception and Brief requesting the Commission to consider the following findings of facts, conclusions of law and decisions made by the Hearing Examiner and to issue an Order consistent with the points raised below.

9. Each finding, inference, conclusion or decision cited in this Exception and Brief constitutes error, arbitrary and capricious action, or is clearly erroneous in view of the reliable, probative and substantive evidence on the whole record or is an abuse of discretion all of which results in prejudice to the substantial rights of ORS. In addition,

the Proposed Order contains errors that are unsupported by substantial evidence, that are made upon unlawful procedure, or that violate constitutional or statutory provisions.

**I. The Hearing Examiner Exceeded His Authority**

10. The Hearing Examiner exceeded statutory and regulatory authority in that matters not included in the record were considered. In reaching the finding that New Horizons lacks financial capability to operate, the Proposed Order cites and discusses an Order issued by U.S. Bankruptcy Judge Robert Somma in Adversary Proceeding No. 05-01441-RS in the United States Bankruptcy Court, District of Delaware (Chapter 11, Case No. 02-12873 (PJW)) (“Bankruptcy Order”).<sup>1</sup> This Bankruptcy Order was not entered into the record by the Parties or referenced by the Parties. Instead, the Hearing Examiner *sua sponte* located and cited the Bankruptcy Order as “public record.” Public information may not be treated as evidentiary information on the record. S.C. Code Ann. § 58-9-1020 (Supp. 2006) states:

In any hearing the commission may employ a special agent or examiner, who may administer oaths, examine witnesses consistent with the Judicial Code of Conduct, and receive evidence in any locality which the commission, having regard to the public convenience and the proper discharge of its functions and duties, may designate. The testimony and evidence so taken or received shall have the same force and effect as if taken or received by the commission or any one or more of the commissioners as provided in Section 58-9-1010. But any hearing involving rates of any telephone utility shall be held before a majority of the full commission. [Emphasis added.]

11. As set forth above, the Hearing Examiner is subject to the Code of Judicial Conduct. Further, any Commission employee, such as the Hearing Examiner, is subject to the Code of Judicial Conduct pursuant to S.C. Code Ann. § 58-3-30 (Supp. 2006). By

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<sup>1</sup> Proposed Order at pg. 4.

independently investigating facts, the Hearing Officer violated Rule 501 of the Code Judicial Conduct, Canon 3. The commentary to Rule 501, Canon 3 explicitly states that “A judge must not independently investigate facts in a case and must consider only the evidence presented.” By utilizing the Bankruptcy Order, the Hearing Examiner exceeded statutory authority and conducted an independent investigation by gathering information outside the record.<sup>2</sup>

12. The Bankruptcy Order was also not noticed as a fact believed to be permissible by the Hearing Examiner as provided for in 26 S.C. Code Regs. 103-846(C) (S.C. Reg. Vol. 31, Issue 4, April 27, 2007). Specifically, this Regulation allows that:

Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. *Parties of record shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed. Parties shall be afforded an opportunity to contest the material proposed to be noticed.* [Emphasis added.]

The Administrative Procedures Act, S.C. Code Ann. § 1-23-330(4) also requires such notice prior to or during the hearing with an opportunity provided to the Parties to contest the material noticed. In the present matter, the Parties were not notified of the intent to utilize the Bankruptcy Order or provided an opportunity to contest the Bankruptcy Order's use prior to learning it was used in rendering a decision. Accordingly, the Hearing Examiner exceeded his authority by conducting an independent investigation and

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<sup>2</sup> Prior to 2004 S.C. Acts 175, enacted July 1, 2004, the Commission was authorized to some extent to perform investigatory functions. Act 175, however, enabled ORS, and relieved the Commission, of the authority to inspect, audit, investigate and examine utilities within the jurisdiction of the Commission. See S.C. Code Ann. § 58-4-50(A)(2) and § 58-3-200 (Supp. 2005). Pursuant to S.C. Code Ann. § 58-4-55 (Supp. 2005), ORS has the investigatory, examination and auditing powers and duties. By authorizing ORS to conduct inspections, examinations and investigations, the legislature excluded the Commission from doing so.

by not providing prior notice to the parties of the intended use of the Bankruptcy Order. Furthermore, the failure to provide prior notice results in a denial of due process.

## **II. The Proposed Order is Inconsistent With Commission Rulings**

13. The Proposed Order denying the Certificate of PC&N is inconsistent with prior Orders. The Proposed Order discusses New Horizons's: 1) negative equity (greater total liabilities than total assets) and 2) negative working capital (greater current liabilities than current assets). A review of prior telecommunication applications for Certificates of PC&N shows that Certificates have been granted to telecommunication companies in financial condition similar to or worse than New Horizons. Examples of telecommunications companies who have been granted Certificates of PC&N include:<sup>3</sup>

- ATX Licensing, Inc., PSC Docket No. 2005-23-C and Order No. 2005-480, had negative equity and negative working capital and was not profitable at the time of its application. Further, it was filed with the Commission that ATX Licensing's parent, ATC Communications, was in bankruptcy at the time of ATX Licensing's application.
- AccessLine Communications Corporation, PSC Docket No. 2005-163-C and Order No. 2005-554, had negative equity and negative working capital and was not profitable at the time of its application.
- Voicecom, PSC Docket No. 2005-85-C and Order No. 2005-519, had negative equity and negative working capital at the time of its application.
- PNG Telecommunications, Inc., PSC Docket No. 2006-303-C and Order No. 2007-42; Phone 1, Inc., PSC Docket No. 2006-60-C and Order No. 2007-226; and Dial Tone & More, Inc., PSC Docket No. 2005-123-C and Order No. 2005-455 were issued Certificates of PC&N while possessing negative working capital.
- Zeus Telecommunications, LLC, PSC Docket No. 2006-148-C and Order No. 2006-535 filed an application without a balance sheet. While ORS performed due diligence by seeking and reviewing the balance sheet, the Commission did not also seek the financials. The Commission adopted ORS's recommendation.

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<sup>3</sup> These bulleted items are examples and are not intended to be an exhaustive list.

14. In the present matter, the Hearing Examiner is inconsistent with prior Commission Orders in denying the Certificate of PC&N based on whether New Horizons presented evidence of financial viability. ORS further submits that, if the Commission wishes to establish a new standard regarding financial viability to assist them in deciding which telecommunications applicants may be granted Certificates of PC&N, the Commission make the new standard available to the public.

### **III. The Commission Erred By Not Approving the Settlement Agreement**

15. There is error in not approving the Settlement Agreement. As set forth in this Exception and Brief, the Proposed Order is in error because it is in violation of constitutional and statutory provisions; is in excess of statutory authority of the agency; is made upon unlawful procedure; is affected by other error of law; is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.<sup>4</sup>

WHEREFORE, having set forth the proper grounds, ORS requests that the Commission issue an order:

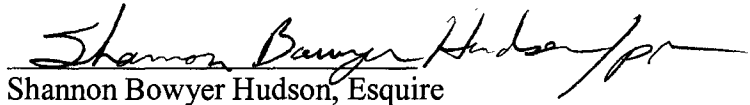
- A. Finding that the Bankruptcy Order should not have been considered in rendering the decision reached in the Proposed Order;
- B. Issuing a Certificate of PC&N to New Horizons consistent with prior Commission telecommunication orders;
- C. Granting such other relief as is just and proper.

Dated this 24th day of May, 2007.

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<sup>4</sup> S.C. Code Ann. § 1-23-380(5) (Supp. 2006).

**South Carolina Office of Regulatory Staff**

A handwritten signature in black ink, reading "Shannon Bowyer Hudson" with a stylized flourish at the end.

Shannon Bowyer Hudson, Esquire

**South Carolina Office of Regulatory Staff**

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**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2007-20-C**


IN RE:

Application of New Horizons Communications	)	
Corporation for Authority to Operate as a	)	
Reseller of Interexchange Telecommunication	)	<b>CERTIFICATE OF</b>
Services within the State of South Carolina	)	<b>SERVICE</b>

This is to certify that I, Pamela J. McMullan, an employee with the Office of Regulatory Staff, have this date served one (1) copy of the **EXCEPTION AND BRIEF TO PROPOSED ORDER OF THE HEARING EXAMINER** in the above-referenced matter to the person(s) named below by causing said copy to be deposited in the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below:

**Lance J.M. Steinhart, Esquire**  
1720 Windward Concourse, Ste 250  
Alpharetta, GA 30005

**Scott Elliott, Esquire**  
Elliott & Elliott, P.A.  
721 Olive Street  
Columbia, SC 29205

  
\_\_\_\_\_  
Pamela J. McMullan

May 24, 2007  
Columbia, South Carolina